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No. 85-1979

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES; UNITED STATES SENATE; THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

LLOYD N. CUTLER*
Wilmer, Cutler & Pickering,
1666 K Street, N.W., Washington, D.C. 20036.
(202) 872-6200
Counsel for Appellant, Comptroller General

MICHAEL DAVIDSON*
Senate Legal Counsel,
642 Hart Senate Office Building,
Washington, D.C. 20510.
(202) 224-4435
Counsel for Appellant, United States Senate

STEVEN R. ROSS*
General Counsel to the Clerk,
H-105, The Capitol, Washington, D.C. 20515.
(202) 225-9700
Counsel for Appellants,
Thomas P. O'Neill, Jr.,
Speaker of the United States
House of Representatives, et al.

**Counsel of Record*

QUESTION PRESENTED

Whether it violates the principle of separation of powers for the Comptroller General, an independent officer of the United States appointed by the President for a statutory term of years by and with the advice and consent of the Senate, to perform the administrative tasks assigned to him by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, because a provision (now 31 U.S.C. 703(e)) of the Budget and Accounting Act of 1921 establishes a procedure for his removal for cause by an enactment in conformity with the Presentation Clause, particularly when that provision has never been used or tested and could be severed if necessary.

PARTIES IN THE DISTRICT COURT

The plaintiffs in Civil Action No. 86-0154, in addition to the American Federation of Government Employees, AFL-CIO, were Ralph G. Fitch, Jr. and James H. Lynch, Jr. The United States was the defendant. The Senate, the Speaker and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General were intervenors. The individual House intervenors were Speaker Thomas P. O'Neill, Jr., Majority Leader Jim Wright, Minority Leader Robert H. Michel, Majority Whip Thomas S. Foley, and Minority Whip Trent Lott.

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OPINION BELOW

The opinion (App. 1a) and order of the district court (App. 9a) are not reported. Part of the order grants declaratory relief identical to the relief granted by the district court in *Charles A. Bowsher, Comptroller General of the United States* v. *Mike Synar, Member of Congress, et al., United States Senate* v. *Mike Synar, Member of Congress, et al.,* and *Thomas P. O'Neill, Jr., Speaker of the United States House of Representatives, et al.* v. *Mike Synar, Member of Congress, et al.,* pending as Nos. 85-1377, 85-1378, 85-1379 in this Court ("*Synar*"). The opinion of the district court in *Synar* is reported at 626 F. Supp. 1374. The district court's order in *Synar* is reported at 626 F. Supp. 1404. The opinion and order are also re-

printed in the Joint Appendix filed here in those cases ("Synar J.A.") at 27–82.

JURISDICTION

The jurisdiction of the district court was based on sections 274(a) (1) and (2) of the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Deficit Control Act" or the "Act"), Pub. L. No. 99–177, and the case below was heard and determined by a three-judge court pursuant to section 274(a)(5) of the Act. Synar J.A. 162–63. The district court entered its final order on May 6, 1986. The Comptroller General, the United States Senate, and the Speaker and Bipartisan Leadership Group of the House of Representatives filed a joint notice of appeal on May 8, 1986 in the district court. App. 11a.

This Court has jurisdiction under 28 U.S.C. 1252 because the order of the district court holds that provisions of an Act of Congress are unconstitutional. The jurisdiction of this Court is also founded on section 274(b) of the Act, Synar J.A. 163–64, which provides in part: "Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Appointments Clause, article II, section 2, clause 2 of the Constitution. Synar J.A. 92.

2. 31 U.S.C. 703(a)(1) and (e), Synar J.A. 101–02, which codify sections 302 and 303 of the Budget and Accounting Act of 1921, Pub. L. No. 13, ch. 18, 42 Stat. 20, 23–24. Synar J.A. 92, 94.

3. Part C of the Deficit Control Act, 99 Stat. 1063–93, 2 U.S.C. 901–907. Synar J.A. 109–61.

STATEMENT

An explanation of the administrative deficit reduction mechanism contained in the Deficit Control Act appears

at pages 2–4 of the jurisdictional statement filed in *United States Senate* v. *Mike Synar, Member of Congress, et al.*, No. 85–1378. On January 17, 1986 the American Federation of Government Employees and two federal annuitants brought an action for declaratory relief which alleged that the Act violates Article I, Section 7 of the Constitution and that the Act commingles legislative and executive powers in violation of the constitutional separation of powers. The complaint further alleged that both the Act's administrative deficit reduction mechanism and its fallback procedure are impermissibly vague under the due process clause of the Fifth Amendment. In an amended complaint, the plaintiffs alleged that the Act's fallback procedure is also unconstitutional because it establishes special rules for the consideration of fallback legislation in violation of the constitutional right of each House to determine the rules of its proceedings.

The plaintiffs moved for summary judgment on their several claims. The district court denied plaintiffs' motion to consolidate their action with *Synar* v. *United States* and *National Treasury Employees Union* v. *United States*, which were then before that court. The United States, which had been named as the sole defendant, joined the plaintiffs in moving for summary judgment on their separation of powers claim, but opposed the plaintiffs' challenge to the constitutionality of the fallback procedure. The Senate, the Speaker and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General intervened to defend the Act's administrative deficit reduction mechanism. The Senate and House parties also presented defenses to the plaintiffs' challenge to the fallback procedure.

Following its decision in *Synar* v. *United States*, the district court directed the parties to show cause, in light of that decision, why the court should not grant the plaintiffs' motion for summary judgment on the constitutionality of the Act's administrative deficit reduction procedure. The court also directed the defendant and interve-

nors to respond to plaintiffs' claim that the fallback procedure is unconstitutional.

Intervenors objected to the entry of another duplicative judgment on the constitutionality of the Act's administrative deficit reduction mechanism. Nevertheless, on May 6 the court granted plaintiffs' request for "declaratory relief identical to that granted by this court to the plaintiffs in *Synar* v. *United States*. . . ." App. 9a. However, the district court denied plaintiffs' challenge to the fallback procedure, ruling that plaintiffs lacked standing. App. 7a–8a. The court explained that "we know of no case in which a plaintiff has successfully argued that he had standing because he was likely to be injured by legislation that had not yet been passed." App. 7a. Because the district court dismissed plaintiffs' claim on the fallback procedure, this appeal is limited to the court's grant of declaratory relief invalidating the Act's administrative deficit reduction mechanism.

THE QUESTION IS SUBSTANTIAL

This appeal presents the identical constitutional question presented by the *Synar* appeals, in which probable jurisdiction was noted on February 24, 1986, and in which oral argument was heard on April 23, 1986. That question is substantial for the reasons discussed in the jurisdictional statements filed in those three appeals.

CONCLUSION

Probable jurisdiction should be noted, except that this Court may choose to defer action on this jurisdictional statement pending its disposition of *Synar,* Nos. 85–1377, 85–1378, 85–1379. We have offered a similar suggestion in *Bowsher, et al.* v. *American Postal Workers Union, AFL–CIO, et al.,* No. 85–1693, in which the district court also entered a judgment duplicating the judgment in *Synar.* Appellee American Federation of Government Employees is participating in the *Synar* appeals as *amicus curiae* on a joint brief with the American Federation of Labor and

Congress of Industrial Organizations and several other unions.

Respectfully submitted,

LLOYD N. CUTLER,
Wilmer, Cutler & Pickering,
1666 K Street, N.W.,
Washington, D.C. 20036.
(202) 872-6200
Counsel for Appellant, Comptroller General.

MICHAEL DAVIDSON,
Senate Legal Counsel,
642 Hart Senate Office Building,
Washington, D.C. 20510.
(202) 224-4435
Counsel for Appellant, United States Senate.

STEVEN R. ROSS,
General Counsel to the Clerk,
H-105, The Capitol,
Washington, D.C. 20515.
(202) 225-9700

Counsel for Appellants,
Thomas P. O'Neill, Jr.,
Speaker of the United States
House of Representatives, et al.

Dated: June 1986.

United States District Court for the District of Columbia

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, INTERVENORS

Civil Action No. 86-0154

(Filed, May 6, 1986, James F. Davey, Clerk)

Before SCALIA, *Circuit Judge* of the United States Court of Appeals for the District of Columbia Circuit, JOHNSON, *District Judge* of the United States District Court for the District of Columbia, and GASCH, *Senior District Judge* of the United States District Court for the District of Columbia.

PER CURIAM:

Plaintiffs, the American Federation of Government Employees ("AFGE") and two individuals who receive federal annuities under the Civil Service retirement laws, challenge the constitutionality of certain features of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, popularly known as the Gramm-Rudman-Hollings Act. The challenge is brought pursuant to paragraph 274(a)(2) of the Act, which authorizes "adversely affected" parties to bring actions for declaratory judgment and injunctive relief concerning the Act's constitutionality in this court. The principal issue in the case is whether plaintiffs have standing to bring their suit.

I

Plaintiffs first challenge the Act's "automatic deficit reduction process," which is intended to reduce the federal budget deficit to zero by fiscal year 1991. That process requires that each year the Directors of the Congressional Budget Office ("CBO") and the Office of Management and Budget ("OMB") estimate the amount of the deficit for the upcoming fiscal year. Act § 251(a)(1). If the estimate exceeds (by a specified amount) the deficit target level for that year, the Directors must calculate, pursuant to detailed provisions of the Act, reductions in the budgets of various federal programs sufficient to eliminate the excess. *Id.* § 251(a)(3). The Directors jointly report their deficit estimates and budget reduction calculations to the Comptroller General, who reviews their report and issues a similar one, containing his own deficit estimates and budget reduction calculations, to the President and Congress. *Id.* § 251(a)(2), (b). The President then issues a "sequestration" order mandating that the budget reductions specified by the Comptroller General be implemented. *Id.* § 252(a)(1), (a)(3). In fiscal years 1987 through 1991, the Directors of the CBO and the OMB and the Comptroller General are required to submit revised reports later in the year, *id.* § 251(c), upon which the President bases a final sequestration order, *id.* § 252(b)(1).

On February 1, 1986, the President issued the sequestration order for fiscal year 1986, to take effect March 1, 1986. *Order, Emergency Deficit Control Measures for Fiscal Year 1986* (Feb. 1, 1986). Among other things, that order permanently cancelled cost-of-living adjustments ("COLAs") that those receiving federal retirement annuities would have received in 1986. *Id.* at 1, 4. The individual plaintiffs, and AFGE on behalf of certain of its members, have standing to challenge the constitutionality of the automatic deficit reduction process as a result of this injury. *See Synar* v. *United States*, 626 F. Supp. 1374, 1380–81 (D.D.C.) (three-judge court) (per curiam) (similarly situated plaintiffs had standing to challenge the consti-

tutionality of the automatic deficit reduction process), *prob. juris. noted sub nom. Bowsher* v. *Synar,* 106 S.Ct. 1181 (1986). The plaintiffs in this case challenge the automatic deficit reduction process on many of the grounds advanced by the plaintiffs in *Synar,* including that which there prevailed, *viz.,* that the process unconstitutionally grants executive power to the Comptroller General, who is removable by joint resolution of Congress. Because no good cause has been shown why plaintiffs should not obtain the declaratory relief they have requested in connection with this claim, which relief is identical to that granted by this court to the plaintiffs in *Synar,* we grant plaintiffs' motion for summary judgment on this claim.

II

Plaintiffs' second challenge is to the Act's "fallback deficit reduction process," an alternative mechanism intended to reduce the federal budget deficit in the event that the reporting provisions of the automatic deficit reduction process were "invalidated." *See* Act § 274(f)(1). Although this court's holding in *Synar* was such an invalidation, the fallback deficit reduction process has not yet been implemented, because the judgment in *Synar* was stayed pending further judicial review, as required by subsection 274(e) of the Act. Under the fallback process, the budget deficit estimates and budget reduction calculations made by the Directors of the CBO and the OMB are reported not to the Comptroller General but rather to a special joint committee of Congress. Act § 274(f)(1). That joint committee, which is composed of the entire membership of the Budget Committees of the Senate and the House of Representatives, must within five days report to both Houses a joint resolution setting forth the contents of the Directors' report. *Id.* § 274(f)(2)–(3). Consideration of the joint resolution in both Houses is to be governed by special parliamentary rules set forth in paragraph 254(a)(4) of the Act. *Id.* § 274(f)(4). Among these parliamentary rules, the most significant are the prohibition of motions to amend the joint resolution, *id.* § 254(a)(4)(D), and the

requirement that each House take a final vote on the reported joint resolution within five days on which that House is in session after the joint resolution is reported out of the joint committee, *id.* § 254(a)(4)(A). If the joint resolution is passed by both Houses and signed by the President (or a presidential veto is overridden), it is then deemed to be the report of the Comptroller General upon which the President is required to base any sequestration order. *Id.* §§ 274(f)(5), 252(a)–(b).

Plaintiffs attack this process on three major grounds. First, stressing the uncertain nature of the economic predictions made by the Directors of the CBO and the OMB in formulating their report, and the consequently uncertain effect of the Act upon the COLA increases in which plaintiffs are interested, plaintiffs argue that the fallback deficit reduction process is so vague as to violate the due process clause of the fifth amendment. Second, plaintiffs argue that, by statutorily determining the procedures governing congressional consideration of the joint resolution, the Act unconstitutionally interferes with the power of each House to change its internal rules unilaterally. Third, plaintiffs argue that, because the report upon which the joint resolution (and therefore any presidential sequestration order) must be based is drawn up in part by the Director of the CBO, a legislative officer, the fallback deficit reduction process unconstitutionally vests executive powers in a legislative officer in violation of the doctrine of separation of powers. At times, plaintiffs also appear to be making a fourth argument (seemingly inconsistent with their third), *viz.,* that because the report upon which the joint resolution must be based is drawn up in part by the Director of the OMB, an executive officer, the fallback deficit reduction process delegates legislative authority to an official of the executive branch in violation of the doctrine of separation of powers.

In response, the United States argues that the plaintiffs' challenges to the fallback deficit reduction process are unripe because that process has not yet been and may

never be invoked, and that the Act is not unconstitutionally vague. The Speaker and Bipartisan Leadership Group of the House of Representatives argue that the challenge to the parliamentary rules governing congressional consideration of the joint resolution presents a nonjusticiable political question. Finally, the Senate argues that there is no constitutional defect in those rules, because subsection 271(c) of the Act expressly provides that each House may alter them in the same way it might alter any other internal rule.

III

Before reaching these issues, however, we must satisfy ourselves that the plaintiffs possess Article III standing to raise their challenges. "Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475–76 (1982) (footnote omitted). It is by now well established that

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and is "likely to be redressed by a favorable decision," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

Id. at 472 (footnote omitted). Although there are additional "prudential" principles that bear on the question of standing, *see id.* at 474–75, we have previously held that these are inapplicable to challenges brought under section 274 of the Gramm-Rudman-Hollings Act, which expands standing to the full extent permitted by Article III. *See Synar*, 626 F. Supp. at 1380 n.3. We therefore test plaintiffs' allegations of injury against the "core" requirements of Article III.

Although those allegations are regrettably imprecise, *see* Amended Complaint ¶¶ 16–18, they can be read generously to identify four separate injuries that the individual plaintiffs and those of AFGE's members who receive federal retirement annuities are suffering or will suffer as a result of the Act. The first alleged injury is that payment of 1986 COLA increases has been temporarily suspended by the Act. Amended Complaint ¶¶ 16 & 17. The difficulty with this allegation is that the Act's temporary suspension of payment of 1986 COLA increases ended on March 1, 1986, when the presidential sequestration order permanently cancelling those COLA increases went into effect. Thus, the plaintiffs are currently suffering no injury from the Act's temporary suspension provisions.

The second alleged injury is that the presidential sequestration order which has already been issued pursuant to the automatic deficit reduction process permanently cancelled the 1986 COLA increases that otherwise would have been paid. Amended Complaint ¶ 17. This injury is clearly sufficient to constitute injury-in-fact for Article III purposes, and would be redressed by a declaration that the presidential sequestration order was without legal force and effect. *See Synar,* 626 F. Supp. 1380–81. It is for this reason that we have granted plaintiffs' motion for summary judgment on their claim that the automatic defict reduction process is unconstitutional. *See supra* at 3–4. But this injury cannot give plaintiffs standing to attack the fallback deficit reduction process. This court has already held that the automatic deficit reduction process can be severed from the fallback deficit reduction process and the rest of the Act. *Synar*, 626 F.2d at 1381 n.6. We think it at least equally apparent that the fallback deficit reduction process can be severed from the automatic deficit reduction process and the rest of the Act. A declaration that the fallback deficit reduction process was unconstitutional therefore would in no way remedy the injury that the sequestration order issued

pursuant to the automatic deficit reduction process has inflicted upon plaintiffs.

The same reasoning demonstrates the inadequacy of the third injury alleged by plaintiffs, to wit, that the automatic deficit reduction process might result in sequestration orders reducing or cancelling COLA increases in future fiscal years. Amended Complaint ¶ 16. A declaration that the fallback deficit reduction process was unconstitutional would have no effect on the future functioning of the automatic deficit reduction process.

The last injury identified by plaintiffs is that, if the automatic deficit reduction process is invalidated by the Supreme Court, the fallback deficit reduction process will be implemented in fiscal year 1986 and thereafter, and presidential sequestration orders issued pursuant to that process might permanently reduce or cancel COLA increases that would otherwise be payable in those fiscal years. Amended Complaint ¶ 16. But the issuance of a presidential sequestration order under the fallback deficit reduction process would require the passage of legislation, and we know of no case in which a plaintiff has successfully argued that he had standing because he was likely to be injured by legislation that had not yet been passed. *Cf. Physicians' Education Network, Inc.* v. *HEW*, 653 F.2d 621, 624 (D.C. Cir. 1981) (per curiam) (court declined to "speculate on what Congress will do in the future"). Such allegations of injury are simply "conjectural" and "hypothetical," *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983), and therefore insufficient to meet Article III's requirement that future injury be "real and immediate," *id.*, and " 'certainly impending,' " *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923)).

IV

Because plaintiffs have failed to establish that the fallback deficit reduction process has caused, is causing or will cause them any injury that could be remedied by a

declaration that that process was unconstitutional, we dismiss plaintiffs' challenge to that process for lack of standing. We do, however, grant plaintiffs' motion for summary judgment on their request for a declaration that the automatic deficit reduction process is unconstitutional, for the reasons given in this court's opinion in *Synar,* 626 F. Supp. at 1391-1404. These dispositions are reflected in the attached Order.

/s/ ANTONIN SCALIA,
Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit.

/s/ NORMA HOLLOWAY JOHNSON,
District Judge of the United States District Court for the District of Columbia.

/s/ OLIVER GASCH,
Senior District Judge of the United States District Court for the District of Columbia.

United States District Court for the District of Columbia

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, INTERVENORS

Civil Action No. 86-0154

(Filed, May 6, 1986, James F. Davey, Clerk)

ORDER

Upon consideration of the pending dispositive motions filed by the parties, the memoranda of points and authorities in support thereof and in opposition thereto, and the entire record herein, and for the reasons stated in the accompanying opinion, it is by the court this 6th of May, 1986,

ORDERED that, because no good cause has been shown why summary judgment ought not be granted to plaintiffs insofar as they challenge the "automatic deficit reduction process" established by the Balanced Budget and Emergency Deficit Reduction Control Act of 1985 and request declaratory relief identical to that granted by this court to the plaintiffs in *Synar* v. *United States,* 626 F. Supp. 1374, 1380-81 (D.D.C.) (three-judge court) (per curiam), *prob. juris. noted sub nom. Bowsher* v. *Synar,* 106 S.Ct. 1181 (1986), plaintiffs' request for such declaratory relief be and hereby is granted; and it is further

ORDERED that, because plaintiffs lack standing to challenge the "fallback deficit reduction process" estab-

lished by the Balanced Budget and Emergency Deficit Reduction Control Act of 1985, defendant's motion to dismiss that challenge for lack of subject matter jurisdiction be and hereby is granted.

/s/ ANTONIN SCALIA,
Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit.

/s/ NORMA HOLLOWAY JOHNSON,
District Judge of the United States District Court for the District of Columbia.

/s/ OLIVER GASCH,
Senior District Judge of the United States District Court for the District of Columbia.

In the United States District Court for the District of Columbia

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, RALPH G. FITCH, JR., AND JAMES H. LYNCH, JR., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT,

UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, INTERVENORS.

Civil Action No. 86-0154

(Filed, May 8, 1986, Clerk, U.S. District Court, District of Columbia)

JOINT NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that intervenors United States Senate, Speaker and Bipartisan Leadership Group of the United States House of Representatives, and Comptroller General of the United States hereby appeal to the Supreme Court of the United States from the final order entered in this case on May 6, 1986, granting the plaintiffs' request for declaratory relief identical to that granted by this Court to the plaintiffs in *Synar* v. *United States,* 626 F. Supp. 1374 (D.D.C.) (three-judge court) (per curiam), *prob. juris. noted sub nom. Bowsher* v. *Synar,* 106 S.Ct. 1181 (1986).

This appeal is taken pursuant to 28 U.S.C. § 1252 and section 274(b) of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177.

Respectfully submitted,

/s/ MICHAEL DAVIDSON,*

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* Appearance pursuant to 2 U.S.C. sec. 288*l*(b) (1982).

Senate Legal Counsel,
642 Hart Senate Office Building,
Washington, D.C. 20510
(202) 224-4435
Counsel for Intervenor, United States Senate.

/s/ JOHN H. PICKERING,
Wilmer, Cutler & Pickering,
1666 K Street, N.W.,
Washington, D.C. 20036
(202) 872-6100
009993—D.C. Bar No.
Counsel for Intervenor, Comptroller General.

/s/ STEVEN R. ROSS,
General Counsel to the Clerk,
H-105, The Capitol,
Washington, D.C. 20515
(202) 225-9700
244863—D.C. Bar No.
Counsel for Intervenor Speaker and Bipartisan Leadership Group of the United States House of Representatives.

Dated May 8, 1986.